BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
PORTLAND CALIFORNIA STEAMSHIP CO.)

Appearances:

For Appellant: Scott, Mitchell and Herger, San Francisco

For Respondent: Reynold E. Blight, Franchise Tax Commissioner

O P I N I O N

This is an appeal from the action of the Franchise Tax Commissioner in assessing a proposed additional tax of $2,677.63 against Portland California Steamship Co. based on its return for the taxable year ended December 31, 1928. The procedure governing the proposed tax and the appeal is specifie in Section 25 of the Bank and Corporation Franchise Tax Act, (Stats. 1929, Chapter 13).

There is no dispute concerning the facts. Appellant 4s a California corporation and directors' and stockholders' meetings are held in San Francisco, where the records of the company are kept. Its entire net income for the year 1928, as disclosed by its return to the Commissioner, was derived exclusively from charter hire of two veseels owned by the corporation. These ships are chartered to Pacific Steamship Co., a Maine corporation, which operates them between ports on the Pacific Coast, viz., Portland, San Francisco, Los Angeles and San Diego.

Appellant is not engaged in any activity in California other than the receipt of the proceeds from the charters which were consummated in 1927. Each charter party is what is known in the trade as a "bare boat charter," i. e., the vessels are turned over to Pacific Steamship, Co. without crews or supplies. It appears that the Appellant assumes no responsibility whatever concerning the operation of the ships, so that it does nothing but receive the stipulated charter hire,

At the time that it made its return to the Franchise Tax Commissioner the Appellant self-assessed itself for a minimum tax of $25.00 which has been paid. Thereafter, the Commissione proposed the assessment of the additional tax and the taxpayer countered with the proposition that it was not doing business at all within the meaning of the Act. This defense was rejecte by the Commissioner and the corporation has appealed.

We have already had occasion to discuss at some length

what constitutes "doing business" within the meaning of the Bank and Corporation Franchise Tax Act (supra) in our opinion in the matter of the Appeal of Magalia Mining Company (filed January 7, 1930). No useful purpose will be served by reviewing the entire problem here. It will suffice to say that if the corporation is not "doing business" it is not taxable, even for the minimum amount of $25.00; that the most helpful authority on what constitutes "doing business" is to be found in the decisions of Federal Courts construing a similar provision in federal taxing statutes and that the mere ownership of property and collection of rental therefrom does not necessarily imply that a corporation is doing business.

Notwithstanding our views expressed in the Magalia Mining Company case (supra) and the authorities there cited, the Commissioner evinces a desire to re-argue the question of what is "doing business." He has submitted a copy of a letter received by him from Mr. Frank L. Guerena, his legal adviser, stating that the decision of the United States District Court in the case of Central Coal & Coke Co. v. Carselowey, 40 Fed. (2d) 540, is contrary to the opinion of our Board and, therefore, justifies departure from our ruling. This decision was carefully considered by us when it was reported in full in the United States Daily of May 14, 1930, (V. U. S. Daily, 836). We were unable then, as we are now, to perceive the irreconcilable conflict in the views of the Court and, ours as conceived by counsel for the Commissioner.

Central Coal & Coke Co., the plaintiff in that case, was a foreign corporation qualified to do business in Oklahoma, Among the purposes for which it was organized was to buy land and to acquire coal, mineral and mining rights. The company acquired title to coal and coal rights in that state and paid ad valorem taxes thereon for the years 1924 to 1928, inclusive In 1929, it took exception to the valuation placed on its properties and contested the validity of the tax.

Among the grounds of attack was that the corporation was not taxable on its invested capital in Oklahoma, because it was "not doing business in the state." The Oklahoma statute provided, in part, that "all corporations organized, existing or doing busines in this state, for profit, -----" should be taxed on their invested capital. Pointing out that the corporation had qualified to do business in Oklahoma, and, consequently, had an existence there, the Court rejected the contention that the plaintiff did not come within the purview of the taxing statute.

It is true that the Court said that, "In functioning under its charter, it (the plaintiff) has acquired the interests sought to be taxed, and to that extent is engaged in business in Oklahoma." (Emphasis ours.) Continuing, the Court made the observation: "However, the provision of the Oklahoma Statutes cited above provides that, if a corporation exists in Oklahoma it is to be taxed upon the value of moneyed capital invested in the county where the corporation is located, unless it is

real estate which has been taxed as such." (Emphasis ours.)

Therefore, it is obvious that the decision of the Court did not turn necessarily upon the question of whether or not the corporation was "doing business" and that, such a determination being unnecessary to the decision, whatever the Court may have said with reference to the matter constituted "obiter dictum". Having found that the corporation existed in Oklahoma the Court had arrived at a basis of justification for the taxation of its invested capital there.

It has been held repeatedly that mere ownership of property is not doing business. A typical case on this point is Lane Timber Co. v. Hynson, 4 Fed. (2d) 666, 40 A. L. R. 448, in which the United States Circuit Court of Appeals said:

"If a corporation is not engaged in business, it cannot make any difference that what it is doing is authorized by its charter. Owning land is not doing business, nor is paying taxes. Most owners of land, whether corporations or individuals would be willing to sell at a profit."

To the same effect is the decision of Mr. Justice Rudkin in United States v. Hotchkiss Redwood Co., 25 Fed, (2d) 958, wherein it was held that a California corporation, owninga large tract of timber was not doing business. A similar ruling was made with reference to a corporation owning about 10,000 acres of coal land in West Virginia, in the case of Fink Coal & Coke Co. v. Heiner, 26 Fed. (2d) 136. In that holding the Court dismissed the contention that any of the earlier United States Supreme Court cases on the subject had been overruled by Edwards v. Chile Copper Co., 270 U. S. 452. *Nor* is there any reason to believe that when a corporation? otherwise inactive, leases its property it thereby engages in business, (Nunnally Investment Co, v. Rose, 14 Fed. (2d) 189.)

The Commissioner having failed to adduce any authority for his departure from our views previously expressed in the Magalia Mining Company case (supra), save the decision of the United States District Court in the Central Coal & Coke Co. case (supra) which is not conclusive, we are of the opinion that he was not justified in regarding Portland California Steamship Co. as "doing business" within the meaning of the Act. Clearly, the Appellant has brought itself within the rule-announced by the United States District Court in Nunnally Investment Co. v. Rose, supra, wherein it said that:

"If the only substantial corporate activity is the ownership and preservation of real and personal property, the receipt of its ordinary income, which arises from the property itself, rather than from the active use and management of it, and the distribution of such income to the stockholders, with only such corporate organization and activity as is necessary thereto, there is not such a doing of business as is meant by the act. (Federal Revenue Act). While such activity is 'business' in a broad sense, a tax upon such business would be

in substance one on the mere ownership of property, becoming thus a direct tax--------."

O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the action of Reynold E. Blight, Franchise Tax Commissioner, in overruling the protest of Portland California Steamship Co., a corporation, against a proposed additional assessment based upon a return of said corporation for the year ended December 31, 1928, under Chapter 13, Statutes of 1929, be and the same is hereby reversed. Said ruling is hereby set aside and said Commissioner *is* further directed to refund to said corporation any tax collected from it on the basis of said return, as provided in Section 27 of said Chapter, all in conformity with the foregoing opinion of this Board.

Done at Sacramento, California, this 20th day of November 1930, by the State Board of Equalization.

R. E. Collins, Chairman
Fred E. Stewart, Member
Jno. C. Corbett, Member
H. G. Cattell, Member

ATTEST: Dixwell L. Pierce, Secretary